A

NG MIN LIN v. 2HAMPSHIRE MANAGEMENT CORPORATION

HIGH COURT MALAYA, KUALA LUMPUR
JOHN LEE KIEN HOW JC
[CIVIL SUIT NO: WA-22NCVC-700-10-2018]
24 MARCH 2022

B

Abstract – *The word 'may' under s. 78(2) of the Strata Management Act 2013 ('SMA') gives a management corporation the option to either commence an action against a defaulted proprietor or to resort to the mechanism stated in s. 79 of the SMA or any other mechanisms; Section 78(2) provides the management corporations discretion. The filing of a summons in court is not a mandatory mechanism. Hence, the act of executing the mechanism stated in para. 6 of the Third Schedule of the Strata Management (Maintenance and Management) Regulations 2015 by the management corporation, is not wrong or irregular.*

C

D

LAND LAW: *Management corporation – Service charges – Demand for payment of outstanding service charges – Proprietor failed to settle outstanding sum – Management corporation blocked all lift access cards to unit and barred proprietor and/or proprietor's tenant from using common facilities – Proprietor lost tenant/tenancy – Whether lifts were common facilities – Whether management corporation had right to prevent proprietor and/or proprietor's tenant from accessing lifts – Whether there was unlawful possession of unit by management corporation – Whether management corporation should have exhausted all other legal remedies – Whether proprietor could claim for loss of tenancy – Strata Management Act 2013, s. 78*

E

F

This was the plaintiff's claim against the defendant seeking, *inter alia*, (i) declarations that the defendant's acts in denying access to the plaintiff's unit was unlawful and illegal and the defendant was to allow the plaintiff the possession of the unit without restrictions and restraints; (ii) an injunction restraining the defendant from preventing the plaintiff, the plaintiff's tenant and/or persons authorised by the plaintiff to enter and occupy the unit; and (iii) an order that the defendant pays damages to the plaintiff for the loss of the benefit of the tenancy agreement in the sum of RM216,000. The plaintiff was the owner of an apartment unit while the defendant was the management corporation for the said apartment. The plaintiff executed, *inter alia*, a deed of mutual covenants ('DMC') with the developer of the apartment. By virtue of the DMC, the defendant imposed and collected service charges, contribution towards the sinking fund and other charges from all unit owners. In 2017, the unit was rented out to a tenant, but the tenancy was a short one

G

H

I

as there were problems between the plaintiff and the defendant. The defendant sent a notice of demand to the plaintiff, demanding the payment of all outstanding sum in the amount of RM145,634.77. The said notice of demand also stated that if the plaintiff failed to settle such payment within 14 days from the date of the notice, all lift access cards ('LAC') to the unit would be blocked and the plaintiff would be barred from using the common facilities of the apartment. The plaintiff sent an email to the defendant, proposing to settle the amount by paying RM3,000 per month but the defendant rejected the proposal. In the email, the defendant also stated that the LAC to the unit and the intercom system would remain deactivated until all of the amount due was settled. The issues that arose were (i) whether lifts were common facilities of the apartment; (ii) whether the defendant had the right to prevent the plaintiff and/or the plaintiff's tenant from accessing the lifts; (iii) whether there was unlawful possession of the unit by the defendant; (iv) whether the defendant should have exhausted all other legal remedies; and (v) whether the plaintiff could claim for the loss of tenancy.

Held (dismissing claim):

(1) Even though the term 'lift' was not expressly listed as common facilities in the Second Schedule of the DMC, it did not mean that it was not a common facility. The interpretation clause of the DMC made it clear that the list in the Second Schedule of the DMC was not exhaustive. All residents of the apartment used the lifts and they did not belong to anyone exclusively. Lifts are fully maintained by the management corporation and not by any of the residents alone. They were not registered or owned by anyone. All these fit the key and essential characteristics of a 'common property' and 'facility'. The lifts were, therefore, undoubtedly common property and were facilities for the usage of the residents and visitors. (paras 26, 30 & 31)

(2) The defendant was empowered to impose restriction on the plaintiff and the tenant, pursuant to cl. 14.9 of the DMC and paras. 6(4) and (5) of the Strata Management (Maintenance and Management) Regulations 2015 ('Regulations'), whenever there is default and arrears in paying the services charges. Furthermore, the plaintiff made an admission on the defendant's act of carrying out the deactivations; the plaintiff's act in proposing the settlement to the defendant showed that the plaintiff agreed and admitted that the defendant had the right to impose such restriction. This indeed tantamount to estoppel by conduct, as prescribed under s. 115 of the Evidence Act 1950. Therefore, the plaintiff could not deny that he was unable to access the lifts and the common facilities of the said apartment because of his own failure to pay. (paras 35-38 & 40)

(3) There was no evidence showing that the defendant had unlawfully possessed the unit just by restricting the LAC. The tenant was the one occupying the unit and was thus the best person to testify and confirm whether such unlawful possession had taken place. The plaintiff himself could not affirmatively confirm what actually happened during the material time; he did not visit nor occupy the unit then. His failure to call the tenant to testify weakened his allegation. The plaintiff' evidence that the tenant could not access the unit was hearsay evidence and was therefore inadmissible. The plaintiff failed to show that the defendant had obtained or taken unlawful control or possession of the unit. (paras 49-53)

(4) The plaintiff claimed that the defendant should have complied with proper procedures, stated in s. 78 of the Strata Management Act 2013 ('SMA'), to recover the sum due and owing. Section 78(2) of the SMA uses the word 'may' when the filing of summons is mentioned. Therefore, the filing of a summons in court is not a mandatory mechanism which must be exercised by the defendant; rather, it gives discretion to the management corporations. A management corporation has the option to either commence an action against the defaulted proprietor or to resort to the mechanism stated in s. 79 of the SMA or any other mechanism. The defendant had obviously opted to execute the mechanism stated in para. 6 of the Third Schedule of the Regulations. There was nothing wrong or irregular in the adaptation of such mechanism. (paras 54-56, 58 & 60)

(5) The plaintiff brought this upon himself by failing to pay the arrears. The plaintiff failed to show that the defendant must be held liable for his loss of tenancy. (paras 61 & 65)

Case(s) referred to:

Allied Bank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***

Archipelago Insurance Ltd v. Eagleexpress Air Charter Sdn Bhd [2016] 1 LNS 548 HC ***(refd)***

Dato' V Kanagalingam v. David Samuels & Ors [2006] 3 CLJ 909 HC ***(refd)***

Delhi And London Bank Ltd v. Melmoth AD Orchard, 4 IA 127 ***(refd)***

E & O Trading Sdn Bhd v. Americk Singh Sidhu & Ors And Another Appeal [2018] 7 CLJ 685 CA ***(refd)***

Good View Property Sdn Bhd v. Standard Chartered Bank Malaysia Bhd [2014] 6 CLJ 965 CA ***(refd)***

Husli Mok v. Superintendent Of Lands & Surveys & Anor [2014] 9 CLJ 733 FC ***(refd)***

Lew On v. Mohammad Muhamed Avvuu; Setiamas Sdn Bhd & Anor (Third Party) [2022] 1 LNS 103 HC ***(refd)***

Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 8 CLJ 412 CA ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

Ng Ben Thong & Ors v. Krishnan Arumugam [1997] 1 LNS 85 HC ***(refd)***

Pembinaan Perwira Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd [2011] 1 LNS 1769 CA ***(refd)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***
PP v. Norfaizal Mat (No 2) [2008] 8 CLJ 576 HC ***(refd)***
Prestaharta Sdn Bhd v. Ahmad Kamal Md Alif & Ors [2016] 1 LNS 255 CA ***(refd)***
Saiman Umar v. Lembaga Pertubuhan Peladang [2015] 9 CLJ 153 FC ***(refd)***
Sim Tiew Bee v. PP [1973] 1 LNS 138 FC ***(refd)***
Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit B Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***
Tee Hock Keong v. PP [2021] 1 LNS 497 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 32(1), 60(1), 73A, 103, 115
Strata Management (Maintenance and Management) Regulations 2015, regs. 6(5), 31, Third Schedule, para 6(4), (5)
Strata Management Act 2013, ss. 59(2)(a), (b), 78(2), 79, 150
Rules of Court 2012, O. 33A

For the plaintiff - Collin Goonting & Darren Tay Theng Hong; M/s Collin Goonting & Assocs
For the defendant - Himahlinin Ramalingam & Jesselyn Tham; M/s Himahlini & Co

Reported by Lina E

JUDGMENT

John Lee Kien How JC:

Introduction

[1] This is the plaintiff's claim ("this claim") for, amongst others, loss of possession and occupation of plaintiff's property one unit of condominium known as Unit No. 13-1 ("the unit"), located at 2Hampshire Apartment at No. 10, Persiaran 2Hampshire, 50450 Kuala Lumpur ("the said apartment").

Background

[2] The plaintiff was the owner of the unit. Meanwhile, the defendant is the management corporation established under the Strata Management Act 2013 ("SMA 2013") for the said apartment. The plaintiff had purchased the unit from one Charles Erik Jobson *via* a sale and purchase agreement ("SPA") with a purchase price of RM2,221,720.

[3] On 22 February 2010, the plaintiff executed a deed of mutual covenants ("the DMC") with Prosper Land & Properties Sdn Bhd, the developer of the said apartment. Somewhere in 2017, the plaintiff managed to rent out the unit to one Tiew Boon Jin ("the tenant") for a period of three years at a monthly rental of RM6,000. However, the tenancy was short-lived allegedly due to the problem that arose between the plaintiff and the defendant.

[4] By virtue of the DMC, the defendant imposed and collected service charges, contributions towards the sinking fund and other charges from all unit owners of the said apartment. On 11 September 2017, the defendant sent a notice of demand to the plaintiff demanding the payment of all outstanding sum totalling RM145,634.77. The said notice had stated that if the plaintiff failed to settle such payment within 14 days from the date of the notice, all lift access cards ("LAC") to the unit would be blocked and the plaintiff was also barred from using the common facilities of the said apartment.

[5] Subsequently, on 27 September 2017, the plaintiff sent an email to the defendant proposing to settle the amount by paying RM3,000 per month. However, the defendant, in reply, had rejected the proposal and stated that the LAC to the unit and the intercom system would remain deactivated until all of the amount due was settled.

[6] As the plaintiff was not satisfied with the defendant's response, he filed this claim against the defendant. The plaintiff was, in essence, seeking the following:

(i) a declaration that the acts of the defendant in denying access to the plaintiff's unit is unlawful and illegal;

(ii) a declaration that the defendant is to allow the plaintiff in possession of the unit immediately without any restrictions and restraints;

(iii) an interim injunction (pending the disposal of this action by this court) restraining the defendants, its officers, managers, staff, contractors, assignees, agents and/or any persons claiming thereunder from preventing (by uplifting the inaccessibility to the plaintiff's unit) and or harassing the plaintiff and/or plaintiff's tenant and/or persons authorised by the plaintiff to enter and or take possession of the unit;

(iv) an interim injunction restraining the defendant, its officers, managers, staff, contractors, assignees, agents and/or any persons claiming thereunder from applying to the Commissioner of Building for the attachment of the unit or any other actions;

(v) an injunction restraining the defendant from preventing the plaintiff and/or the plaintiff's tenant and/or persons authorised by the plaintiff to enter and occupy the unit at all material times;

(vi) an order that the defendant pays damages to the plaintiff for the loss of the benefit of the tenancy agreement in the sum of RM216,000;

(vii) damages for unlawful possession of the unit;

(viii) special damages and general damages to be assessed;

(ix) liberty to apply for consequential orders;

(x) costs; and

(xi) further or other relief and/or order which this court thinks fit and just to grant.

[7] Subsequently, the defendant filed its defence and counterclaimed against the plaintiff. The defendant in its counterclaim seeks the following:

(i) the sum of RM178,171.22;

(ii) interests on the sum of RM178,171.22 at the rate of 10% per annum, calculated on daily rests from 22 November 2018 until the date of full payment;

(iii) costs; and

(iv) further and other relief deemed fit and proper by this court.

[8] On 13 December 2018, the defendant filed an application for summary judgment for its counterclaim. Summary judgment dated 23 May 2019 was granted in favour of the defendant and the plaintiff was ordered to pay the outstanding service charges, sinking fund, contributions and other charges due as at 21 November 2018. The plaintiff then appealed against the judgment. However, the Court of Appeal dismissed his appeal on 31 January 2019. The full trial of the main suit, namely, this claim then proceeded before me.

The Trial

[9] Both the plaintiff and the defendant called one witness each during the trial. The two witnesses were:

PW1 Ng Min Li

DW1 Stephen Choi Kam Thye

The Plaintiff's Case

[10] The plaintiff submitted that the defendant was not entitled under reg. 6(5) of the Strata Management (Maintenance and Management) Regulations 2015 ("the Regulations") to prevent the plaintiff and/or the tenant from using the lifts. The plaintiff premised that reg. 6(5) does not cover 'lifts' as common facilities, thus, the burden of proof was on the defendant to prove that the 'lift' is a part of the services provided by the management corporation.

[11] The plaintiff also premised that the defendant in its letter dated 11 September 2017 had failed, neglected and/or refused to specify the option that the plaintiff shall be entitled to use the service lifts for access to the unit. The defendant's suggestion in using the service lift would cause endangerment to the tenant as there was no specific permission to use the service lifts by the defendant. The plaintiff argued that the defendant's action in preventing the plaintiff and/or the tenant from using the lifts was a direct violation of the plaintiff's right to peaceful enjoyment of the unit and was a breach of its duties as a management corporation.

[12] Next, the plaintiff contended that the defendant ought to have exhausted all its legal remedies provided under s. 78 of SMA 2013 before deliberately preventing the plaintiff and/or the tenant from accessing the unit. The plaintiff also alleged that the defendant only brought an action to recover the sums due as a counterclaim to the plaintiff's claim over one year after the deactivation of the access card.

[13] Apart from that, the plaintiff further contended that the defendant has failed to issue a proper and correct notice pursuant to reg. 31 of the Regulations. Without any proper notice, the defendant was statute-barred from exercising any of its remedies against the plaintiff.

PW1

[14] PW1 who is the plaintiff himself, among others, testified that:

(i) PW1 was the owner of the unit at the material time before he sold the unit in 2020;

(ii) in 2017, he had rented the unit to the tenant for a period of three years commencing 1 March 2017. However, it was short-lived because allegedly, the tenant was prevented by the defendant from accessing the unit;

(iii) PW1 further testified that the tenant had stated in his termination letter dated 14 May 2018 that his access card was disabled and was unable to access the lifts and other facilities of the said apartment;

(iv) PW1 had stated in his answer to question no. 19 of his witness statement that he was made to understand that the denied access of the lifts and facilities of the said apartment was because of the non-payment of the service charges, sinking fund, insurance and interest. The outstanding sum was amount to RM178,171.22; and

(v) after the deactivation, PW1 also stated that he had tried to propose the defendant to settle the said outstanding sum but it was later rejected.

The Defendant's Case

[15] The defendant submitted that it is statutorily empowered under s. 59(2)(a) and (b) of the SMA 2013 to amongst others collect maintenance charges and contributions to the sinking fund. Moreover, as liability has already been firmly established in the summary judgment, it is no longer open for the plaintiff to dispute that he was bound to pay the outstanding charges. To this, the defendant referred to the case of *E & O Trading Sdn Bhd v. Americk Singh Sidhu & Ors And Another Appeal* [2018] 7 CLJ 685; [2018] 6 MLJ 783.

[16] The defendant also contended that the defendant was entitled to restrict the plaintiff's access to lift and common facilities and disconnect the intercom based on cl. 14.9 of the DMC. Clause 14.9 of the DMC provides the consequences of any deficiency in the payment of the security deposit, the service charges and any sum or sums payable. Further, the defendant was also empowered under paras. 6(4) and 6(5) of the Third Schedule of the Regulations to collect the same.

[17] In response to the plaintiff's allegation that there was insufficient notice, the defendant premised that on 11 September 2017, the defendant had sent a notice of demand to the plaintiff. He was specifically notified that if the payment was not received within the stipulated 14-day time period, (i) the plaintiff's LAC to the unit would be blocked from activating the lifts; (ii) the intercom system in the unit would be disconnected; and (iii) the plaintiff was barred from using the common facilities of 2Hampshire Apartments.

[18] Next, the defendant submitted that the plaintiff was also estopped by conduct from claiming that he did not receive the said notice of demand or to challenge the validity of its action. This is because the plaintiff had sent an email dated 27 September 2017 to the management office of the defendant for a settlement proposal rather than arguing on the legality of the deactivation.

DW1

[19] The defendant called its sole witness, DW1 who testified the following:

(i) in 2018, DW1 was the treasurer of the defendant and is presently a committee member of the defendant;

(ii) DW1 testified that the plaintiff had failed to pay the outstanding service charges, sinking fund, contributions and other charges due under the DMC;

(iii) due to the failure of the plaintiff to pay the outstanding sum, DW1 testified that the defendant had deactivated the LAC and barred the plaintiff and/or the tenant from using the common facilities of the said apartment;

(iv) DW1 also testified that even though 'lift' was not stated under the Second Schedule of the DMC, it still constitutes one of the common facilities provided by the defendant;

(v) DW1 also stated in his answer to question 7 of his witness statement that the defendant had obtained a judgment against the defendant for the outstanding service charges, sinking fund, contributions and other charges which was due.

Issues

[20] Before the commencement of the trial, the parties had agreed on the following issues to be tried:

1. Sama ada Deed of Mutual Covenants bertarikh 22/02/2010 di antara Prosper Land & Properties Sdn Bhd, pemaju 2Hampshire Apartment dan plaintiff ("DMC") mengikat plaintif dan Defendan;

2. Sama ada Plaintif sebagai pemilik unit 13-1, 2Hampshire Apartment ("unit") mempunyai hak common law bagi penikmatan unitnya tanpa gangguan (yang dibenarkan di sisi undang-undang) daripada Defendan;

3. Sama ada Defendan telah menghalang Plaintif daripada menikmati penggunaan unit tersebut dan/atau memasuki unit tersebut;

4. Sama ada Defendan telah mengelakkan plaintiff dan/atau penyewanya daripada memasuki unit tersebut, dan telah menyebabkan Plaintif untuk mengalami kerugian dalam sewa;

5. Sama ada Defendan berhak di sisi undang-undang untuk menyahaktifkan (deactivated) kesemua Kad Akses Lif bagi unit tersebut, memutuskan talian sistem intercom dan/atau melarang Plaintif dan/atau penyewanya daripada menikmati common facilities di 2Hampshire Apartment akibat kegagalan Plaintif membayar bayaran perkhidmatan (maintenance charges), sumbangan sinking fund, dan bayaran-bayaran lain seperti yang diperuntukkan di bawah DMC;

6. Sama ada penyahaktifkan kad akses lif, pemutusan talian sistem intercom dan larangan Plaintif dan/atau penyewanya daripada menikmati common facilities terjumlah kepada Defendan mengambil pemilikan unit Plaintif secara tidak sah;

7. Sama ada Defendan harus menggunakan (exhaust) semua remedy di sisi undang-undang sebelum menyahaktifkan (deactivated) kesemua Kad Akses Lif bagi unit tersebut, memutuskan talian sistem intercom dan/atau melarang Plaintif dan/atau penyewanya daripada menikmati common facilities;

8. Sama ada Plaintif berhak kepada ganti rugi untuk pemilikan secara tidak sah oleh Defendan selain daripada kehilangan sewa;

9. Sama ada Plaintif berhak kepada tuntutan-tuntutannya di bawah Writ dan Pernyataan Tuntutan bertarikh 24.10.2018.

Decisions And Findings Of The Court

[21] Basically, the plaintiff's claim against the defendant was on the alleged unlawful acts of the defendant in preventing the plaintiff and/or the tenant to access the unit and other common facilities of the said apartment. After perusing the cause papers, the witnesses' statements, the notes of proceeding, the written and oral submissions and the replies by the parties, I dismiss the plaintiff's claim. Herein are my reasons.

Whether Lifts Are Common Facilities Of The Said Apartment?

[22] It was not disputed that the plaintiff had defaulted in paying service charges, maintenance charges and sinking fund contributions. The defendant had also obtained summary judgment (at pp. 102 to 103 of the common bundle of document ("encl. 54")) against the plaintiff for its counterclaim amounting to RM178,171.22.

[23] The core of the plaintiff's submission was that the 'lifts' or 'elevators' of the said apartment were not considered as part of the common facilities. Subsequently, it was wrong and unlawful for the defendant to bar the plaintiff from accessing the lifts by deactivating the access cards. The DMC executed between the plaintiff and the defendant did not include 'lifts'. The plaintiff further reiterated that para. 6(5) in the Third Schedule of the Regulations stating that the management may only stop or suspend defaulter from common facilities or common services.

[24] For ease of reference, I produce here para. 6(5) of the Third Schedule of the Regulations:

> 6. Defaulters:
>
> ...
>
> (5) The management corporation may stop or suspend a defaulter **from using the common facilities or common services provided by the management corporation**, including any car park bay in the common property that has been designated for the use of the defaulter.
>
> (emphasis added)

[25] In response to the plaintiff's contention, the defendant submitted that the definition of "common property" and "common facilities" are not limited to those listed in the Second Schedule. The defendant refers to the case of *Pembinaan Perwira Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd* [2011] 1 LNS 1769; [2012] 4 MLJ 774 where it was held that in interpreting a document, a clause must not be read in isolation, but must be considered in the context of the whole of the document.

[26] In our case, it is an undeniable fact that 'lifts' were not included under the Second Schedule of the DMC. DW1 agreed to this during his cross-examination:

> [Notes of Proceeding ("NOP") at page 51]
>
> CG Right? Swimming pool, changing rooms, multi-purpose space, laundry utilities, function room. Ok? Services, refuse collection, security guard, landscape maintenance, cleaning maintenance of common property. Am I correct?

STEPHEN That's what it says.

CG Yes. Is there anywhere the word 'lift' is there in the services? Is there any word 'lift'?

STEPHEN It is not listed.

[27] However, I agree with the defendant's submission that in our current case, it does not mean that the lifts are not common facilities. This is because the list of common facilities provided under the Second Schedule of the DMC is not exhaustive. Under the definition of 'common property' and 'facilities' of the DMC (at pp. 21 to 22 of the common bundle of documents), it was stated that:

1. DEFINTIONS/INTERPRETATION

1.1. In this Deed where the context so admits:

...

"Common Property"	means that part of the said Land forming the said Project *which is not comprised in any individual parcel (including any accessory parcel) and including but not limited to the Facilities particulars of which are as described in the Second Schedule hereto* and which the Vendor, the Management or the Management Corporation (as the case may be) has designated as Common Property.
"Facilities"	means the facilities as described in the Second Schedule hereto *and such other facilities as may be provided in the Common property.*

(emphasis added)

[28] DW1 had also testified this during cross-examination:

[NOP at p. 52-53]

CG Commonsensical. If it doesn't appear it doesn't appear. It's not a service provided by the Management Corporation.

STEPHEN It is service provided because without which there would be no lift service.

CG I'm asking you this question. Is it a service provided by the Management Corporation? You just answer me, is it a service provided by Management Corporation because we have gone through this, the services provided is here in the Second Schedule. It's not there. You say you disagree. I'm asking you again, is this lift a service provided by the Management Corporation?

STEPHEN I say it is because – A

CG You say it is.

STEPHEN The Management Corporation maintains the lifts so that there is working set of lifts in the condominium.

[29] I'm guided by the Court of Appeal case of *Prestaharta Sdn Bhd v. Ahmad Kamal Md Alif & Ors* [2016] 1 LNS 255, where the court emphasised the importance of the SPA and the DMC in determining whether certain parcels could form part of the common facilities or otherwise. His Lordship Hamid Sultan JCA (as he then was) held at p. 33 at para. [8]: B

> (v) ... In our judgment, the S&P and the DMC when read together will show that **the common facilities specified in the Second Schedule of the S&P are the only facilities that are to be used or capable of being used or enjoyed in a common all by all the purchasers** of RBRC including the plaintiffs. C
>
> (emphasis added) D

[30] Therefore, this court answer the first issue in affirmative. Although the term 'lift' is not expressly listed as common facilities in the Second Schedule of the DMC, it does not mean it is not a common facility. The interpretation clause of the DMC has made it clear that the list in the Second Schedule of the DMC is not exhaustive. The key consideration as stated in the E interpretation clause is whether it is not comprised in any individual parcel.

[31] All residents of the said apartment use the lifts and they do not belong to anyone exclusively. The key question here is as per the question I had put to the plaintiff's counsels during the oral submission: if the lifts are not common properties or facilities, what would they be? They cannot be F personal properties or parcels belonging to any of the owners in the said apartment. The plaintiff's counsels had replied with a weak and unconvincing answer that lift can be anything else but not common property facility or facility. We must be mindful that lifts are used daily by masses, in the case of the said apartment, its residents and the visitors. At all material G times, they are fully maintained by the management corporation and not by any of the residents alone. They are not registered or owned by anyone. All these fit the key and essential characteristic of a "common property" and "facility". The lifts are, therefore, undoubtedly common property and are facilities for the usage of the residents and visitors. Thus, the plaintiff's H contention that the lifts are not one of the common property or facilities is totally misplaced and is bound to fail.

Whether The Defendant Has The Right To Prevent The Plaintiff And/Or The Tenant From Accessing The Lifts

[32] The next issue in dispute is whether the defendant has the right to I prevent the plaintiff and the tenant from accessing the unit. It was not disputed that the plaintiff had defaulted in paying service charges,

maintenance charges, and sinking fund contributions. The defendant had also obtained a summary judgment against the plaintiff for its counterclaim for the payments in arrears amounting to RM178,171.22.

[33] The question remains as to whether the defendant has the right to prevent the plaintiff and the tenant from accessing the said lifts? This court answer this in the affirmative. As established above, lifts are common properties. The defendant contended it has the right under the DMC to do as such in the event the parcel owners default in paying any sums due and payable. Clause 14.9 of the DMC (which the plaintiff had signed and agreed to) stated that:

> 14.9. In the event that the Purchase shall fail or neglect to pay the Security Deposit, *the Service Charges and any sum or sums payable* under the Sale Agreement *(including any interest payable thereon) or such other service or maintenance fee as aforesaid lawfully required to be paid by the Purchaser or should there be deficiency in the payment and the Purchaser fails or neglects to make good such deficiency within the time stipulated*, then and in any such event the Vendor, *the Management or the Management Corporation (as the case may be) shall be entitled to*:
>
> (i) *Disconnect, cut off, suspend or without any service or the supply or use of any or all such utilities to the Purchaser or to the said Parcel; and/or;*
>
> (ii) *Stop, suspend or withhold the said Services and any services of the Facilities and/or the Common Property for which the aforesaid payment are payable for the said Parcel; and/or*
>
> (iii) *Bar and restrict the access of the Purchaser to the Facilities and/or the Common Property; and/or*
>
> (iv) *Refuse entry of vehicles of the Purchaser to the compound of the Facilities and/or the Common Property.*
>
> (emphasis added)

[34] Also, paras. 6(4) and 6(5) of the Third Schedule of the Regulations have made it clear that:

> 6. Defaulters
>
> (4) The management corporation *may, at the expiry of the period of fourteen days specified in subparagraph 6(1)(a) of the by-laws and without prior notice, deactivate any electromagnetic access device such as a card, tag or transponder, issued to a defaulter until such time that the any sum remaining unpaid in respect of his parcel has been fully paid*, together with a charge not exceeding ringgit fifty that may be imposed by the management corporation for the reactivation of his electromagnetic access device, the management corporation may require the proprietor to sign in a defaulter requires any assistance for entry into or exit from the building or the development area.

(5) *The management corporation may stop or suspend a defaulter from using the common facilities or common services provided by the management corporation, including any car park bay in the common property that has been designated for the use of the defaulter.*

(emphasis added)

[35] Clause 14.9 of the DMC and paras. 6(4) and 6(5) of the Third Schedule of the Regulations show that whenever there is default and arrear in paying the services charges, the defendant is empowered to impose such restriction to the plaintiff and the tenant. This was also indeed agreed by PW1 himself who is also the plaintiff during the cross-examination.

[NOP at p. 18]

HR Right. Now, I now will refer you to now Clause 14.9 of the deed of mutual covenant. And that is at page 8. Mr Ng, do you agree with me that in the event you failed to pay the maintenance charges or any other service charges, that may be lawfully required of you to pay the Management Corporation, the Management Corporation has all these avenues listed in paragraphs (i) until (vii), there, they can take any of these steps against you? Do you agree with me, Mr Ng?

NG I am reading through

HR Alright

NG That was stated in the statement

HR Yes, so, Mr Ng, if in the event you failed to pay your maintenance charges or any other charges which is lawfully due to be paid to the Management Corporation, at (iii) one of the options available to the Management Corporation is to buy and restrict access of the purchaser which yourself to the facilities and the common facilities.

NG Yes

[36] In a similar vein, the plaintiff also had made an admission on the defendant's act of carrying out the deactivations. The plaintiff has proposed a settlement to the defendant in regard to the outstanding management fees and requested to reactivate the LAC. This was established during cross-examination of PW1 by the defendant's counsel:

[NOP at pp. 31-32]

HR And then on the 27th of September, one day after, you wrote that email to the Management Corporation proposing your settlement. That letter at page –

NG Yes

HR Yes, alright. And at page, that email is at page 82 of the Enclosure 54. Now, the Management Corporation replied to you on the 3rd of October and that reply is at page 83. Now this is an email dated

3rd of October from the management, the defendant basically to you, Mr Ng. 'Please be informed that your proposal to settle the outstanding has been rejected by the 2Hampshire Management Counsel. The access cards to the unit and the intercom serving unit shall remain deactivated until such time the outstanding maintenance fees, interest, quit rent and etc. has been fully settled. Imposition of the late payment interest is stipulated and provided under the Strata Management Act 2013, the rate of which is at 10% has been decided by the resident's owners in the AGM to which the MC has neither the right to reduce nor waive it for whatever reasons, save and except in the case of technical errors on the part of the management or where the request is approved in the AGM.' Now, Mr Ng, after receiving this email on 03.10.2017, did you make payment and settle all the outstanding maintenance charges for your unit? And when I say maintenance charges it also includes the interest, quit rent and all that is due to the defendant.

NG No.

HR Mr Ng, do you agree that you were put on notice that until and unless you settle the maintenance charges, the access cards to your unit would continue to be barred.

NG Yes, according to the email, yes.

HR Yes. So you had full knowledge. Mr Ng.

NG Yes.

HR And Mr Ng, you chose not to make payment.

NG It's not that I chose not to make payment. I proposed the payment that I think I actually so called this, able to do by that time, you see.

HR Yes, but that proposal was rejected by the defendant –

NG Yes

HR Mr Ng. So you were fully aware until and unless you settled your maintenance charges, sinking charges the interest, quit rent and all that was due to the defendant, the access cards to your unit will continue to be barred. You had full knowledge of this, Mr. Ng.

NG Yes, I have the knowledge of it.

[37] The plaintiff's act in proposing the settlement to the defendant shows that the plaintiff agreed and admitted that the defendant has the right to impose such restriction. This indeed is tantamount to estoppel by conduct as prescribed under s. 115 of the Evidence Act 1950, which says:

> When **one person has by his declaration, act** or omission **intentionally caused or permitted another person to believe a thing to be true and to act upon such belief**, otherwise than but for that belief he would have acted, **neither he nor his representative in interest shall be allowed in any suit or proceeding** between himself and that person or his representative in interest to deny the truth of that thing.
>
> (emphasis added)

[38] Therefore, the plaintiff cannot deny the fact that he was unable to access the lifts and the common facilities of the said apartment because of his own failure to pay. I refer to *Archipelago Insurance Ltd v. Eagleexpress Air Charter Sdn Bhd* [2016] 1 LNS 548; [2016] MLJU 236 where it was held:

> [11] *It is trite law that a party should not be allowed to approbate and reprobate its stance*. Similarly, the defendant cannot be allowed to admit the debt, and also deny the debt on the same breath. This court finds guidance in the Court of Appeal decision in the case of *Cheah Theam Kheang v. City Centre Sdn Bhd & Other Appeals* [2012] 2 CLJ 16 regarding the defendant's conduct of blowing hot and cold with its stance:
>
> > In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers* [1990] 3 All ER 376 at pp. 383 to 384. There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. *A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to back and adopt an inconsistent stance*.
>
> (emphasis added)

[39] Furthermore, it is worth mentioning that the defendant also has the right to restrict the tenant from accessing the common facilities. This is as provided under item 6.1(h) of the DMC:

> 6. Affirmative Covenants
>
> 6.1. The Purchaser shall:
>
> ...
>
> (h) be responsible for ensuring that the Purchaser's family(ies), *tenants(s)*, lessee(s), licensee(s), servant(s), agent(s), invitee(s) and visitor(s) *will comply with and abide by the by-laws, rules and regulations imposed by the Vendor, the Management or the Management Corporation (as the case may be) on the use and enjoyment of the said Parcel, the Facilities, the Common Property and/or any part of the said Land* and shall be personally and vicariously liable for any damage caused by his family(ies), tenant(s), lesse(s), licensee(s), servant(s), agent(s), invitees(s) and visitor(s);
>
> (emphasis added)

[40] Therefore, in respect of the second issue, the answer is again affirmative that the defendant has the right to prevent the plaintiff and/or the tenant from accessing the lifts. I will now proceed with the third issue.

Whether There Was Unlawful Possession Of The Unit By The Defendant

[41] As discussed earlier, the defendant as the management corporation has the right to prevent the plaintiff and the tenant from accessing the lifts and other common facilities whenever there is payment in arrears. By preventing the plaintiff and the tenant from accessing the lifts had the defendant illegally taken possession of the unit? On this issue, the plaintiff submitted that the defendant's action in preventing access to the lifts was tantamount to taking control and possession of the unit. With due respect, I disagree.

[42] In particular, the plaintiff has stated in his statement of claim that on 26 September 2017, the defendant has unlawfully prevented the plaintiff from accessing to the unit. Yet, we must be mindful that at all material times, the tenant had occupied the unit between 1 March 2017 and 26 September 2018. The PW1 confirmed this during cross-examination:

[NOP at page 21]

HR Where you said, your tenant did not complete his tenancy of the unit and that he had terminated his tenancy of the unit by his letter dated 14.05.2018.

NG Yes

HR Ok. And in your answer to Question 15, Mr Ng, you had stated that the tenant had only occupied the unit from the 01.03.2017 to the 26.09.2019.

NG Yes

[43] The reasons for the early termination were provided in the tenant's letter addressed to the plaintiff on 14 May 2018, where it was stated:

(a) Access card of the said premise been blocked for months;

(b) No possible to access facilities of 2Hampshire building for months;

(c) No possible to use the lifts of 2Hampshire building for months (**except for service lift**);

(d) No possible to carry out activities which I have prescribed to you prior to renting the said premise;

(e) Continuous harassments from one staff in 2Hampshire Management Body.

(emphasis added)

[44] Due to these reasons, the plaintiff alleged that, by the deactivation of the access card, the defendant had taken possession of the unit. In response, the defendant argued that there was no such unlawful possession as the plaintiff and the tenant may still access the units by other means. As stated in the tenant's letter, he was still able to access the apartment and the unit using the service lift. PW1 has indeed agreed with this during cross-examination:

[NOP at page 22 – 23]

HR Right, Mr Ng, do you agree that your tenant himself in this letter, had admitted that he can access the service lift? Look at paragraph 1C. 'No possible to use the lifts of 2Hampshire building for months except service lift'.

NG Yes

HR Do you agree with me that your tenant himself admits that he is able to access and use the service lift?

NG Yes, he is using the service lift, yes.

[45] It is undisputed that the tenant was still able to access the unit by using the service lift. The letter from the tenant has never complained that he has no access to the unit. Instead, he has stated it clearly that he has to use the service lift to access to the unit. He only complained that he could not be able to access to facilities in the said apartment for months. The logical conclusion here is: he could still access to the unit! Otherwise, why would he occupy the unit between 1 March 2017 and 26 September 2018 as stated by PW1? During re-examination DW1 has also informed the court that:

[NOP at page 64]

HR Sorry, Mr Stephen, I'll repeat my question. A moment ago, it was put to you that the act of the Management Corporation in deactivating the lift access cards to the plaintiff, Mr Ng Min Lin's apartment, it amounted to unlawfully preventing him from accessing his apartment, and you disagreed with that statement just a while ago, Mr. Choi.

STEPHEN Yes

HR My question to you is, please explain to this court why do you disagree with that statement?

STEPHEN The plaintiff was never denied access to his unit. He was always able to come in through the main entrance or through the car park and use either the staircase or the service lift to access his unit. So therefore there was no denial of access to his unit.

[46] The plaintiff further contended that even though the tenant was allowed to use the service lift, the burden is on the defendant to show that the service lift is an alternative for owners and tenants of the said apartment. With respect, I have to disagree with the plaintiff's contention.

[47] It is to be noted that the usage of the service lift to the unit was expressly stated by the tenant in his letter to the plaintiff. The plaintiff has relied on it to establish his case. Also, DW1 has confirmed this in his testimony. Thus, it is established that the tenant could use the service lift to

assess to the unit. The heart of this claim is the plaintiff's allegation that the tenant has been deprived of the access to the unit and that the defendant has illegally taken possession of the unit. Yet, the plaintiff has never tendered anything to refute this admission by the tenant and DW1's testimony. To my mind, in view of that, it is the plaintiff who bears the burden of proof to disproof this and to show to this court that the service lift could not be used to access the unit. Section 103 of the Evidence Act 1950 said this:

> 103. Burden of proof as to particular fact.
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[48] The defendant further cited the Court of Appeal case of *Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 412; [2018] 6 MLJ 548 to support this:

> [33] **It is well-established principle of law that he who asserts must prove. This is particularly so in respect of facts which are within the appellants' knowledge**. The burden of proof is on the appellants to establish on the balance of probabilities that the 2nd appellant, "was not born a citizen of any country." Such rule of evidence is enunciated in s. 103 of the Evidence Act, 1950 which provides:
>
> > The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact shall lie on any particular person.
>
> (emphasis added)

[49] Therefore, I agree with the defendant's arguments that there was no evidence showing that the defendant had unlawfully possessed the unit just by restricting the LAC. Here, the plaintiff seems to forget that his failure to pay the outstanding sum to the defendant was the core reason that the tenant's LAC for the residential lift was barred. This was also confirmed and collaborated by PW1 himself during cross-examination.

> [NOP at page 24]
>
> HR Alright. Mr Ng, in your answer to Question 17 in your witness statement, you had testified that in his termination letter, which I referred you a moment ago, your tenant's termination letter, he had informed you that his access card was disabled by the defendant. And hence, he was unable to access the elevators and facilities in the apartment. And that he also informed you that he was being harassed by the defendant himself. Now, Mr Ng, my question to you is this, why was the access card to your unit disabled or barred?

NG Well, I supposed it is linked to the payment of the service fees. A

HR Do you agree with me Mr Ng, that the reason why the access card was barred was due to your failure to pay the maintenance charges and service charges?

NG As I said, it could be due to the payment issues. B

[NOP at page 25]

HR Correct. So, Mr Ng, I put it to you that you were the cause of the access cards being disbarred because you failed in your duty to pay the outstanding maintenance charges and sinking fund charges that were due to the Management Corporation, the defendant. Do you agree? C

NG Well, this, I will say, this, yes.

HR Alright. Thank you, Mr Ng. Now, Mr Ng, just now in the additional question to you, one of the additional questions, Additional Question No.3, that was asked by your learned counsel just now, Mr Darren, you were asked this question. 'after the 11.09.2017, did you go to your apartment'? And your answer was 'no'. Do you recall? D

NG Yes

[50] Furthermore, at the material time, the tenant was the one occupying the unit. Thus, the best person to testify and confirm with this court whether such unlawful possession had actually taken place is the tenant. During his cross-examination, PW1 said: E

[NOP at page 26]

HR Now, Mr Ng, I would now like to refer you to your statement of claim in Enclosure 45 at paragraph 7. We will share screen that document to you, shortly, Page 20. This is the English version of your statement of claim, Mr Ng. It is pleaded here, that on the 26th September, you had claimed that the defendant had unlawfully prevented you, the plaintiff for accessing your unit. Now, Mr Ng, my question to you is this, if you have never accessed your apartment after 11.09.2017, as you had testified earlier, why is it you are saying that on the 26th September, you were unlawfully prevented from accessing your unit? F G

NG I said this one, I couldn't remember and during that time, I was talking to one of the staff by the name, Sashi, is more on so-called this my tenant that time, trying to so-called access to the unit and he couldn't so-call this access to the unit, you see. H

HR So, Mr Ng, based on your evidence today is that, you did not try to access your unit. But it was rather it was your tenant that informed you that he was trying to access your unit. Is that right, Mr Ng? I

NG Like I said, I couldn't remember what is happening that time, already and I remember during that time, there were many conversations that is actually going through with the staff of the Management Corp, Sashi, pertaining to so-called granting the access to this, according to this access issues to my unit, by my tenant, you see.

HR Alright, Mr Ng, so now, can we get the clarification, could I get the clarification from you, Mr Ng? Did you or did you not access your apartment after 11.09.2017?

NG No.

[51] Clearly, the plaintiff himself cannot affirmatively confirm with this court what actually happened during the material period of time in particular on 26 September 2017. He did not visit or occupy the unit then. His failure to call the tenant to testify has further weakened his allegation. There is simply no evidence demonstrating that the defendant had taken control or possession of the unit. The plaintiff when cross-examined, admitted that he had not accessed the unit after 11 September 2017.

[NOP at page 26]

HR Alright, Mr Ng, so, now, can we get the clarification, could I get the clarification from you, Mr. Ng? Did you or did you not access your apartment after the 11.09.2017?

NG No.

[52] The only person who has personal knowledge whether the plaintiff's tenant could access the unit using the service lift is the tenant himself. The plaintiff's evidence that the tenant could not access the unit is hearsay evidence and is therefore inadmissible. (s. 60(1) of the Evidence Act 1950, *Good View Property Sdn Bhd v. Standard Chartered Bank Malaysia Bhd* [2014] 6 CLJ 965; [2015] 1 MLJ 99). This issue on hearsay evidence would be elaborated further in the last section of this judgment.

[53] Therefore, in answering the third issue, the plaintiff had failed to show to this court that the defendant had indeed obtained or taken such unlawful control or possession of the unit.

Whether The Defendant Should Exhaust All Other Legal Remedies?

[54] The plaintiff claimed that the defendant should have complied with proper procedures stated in s. 78 of the SMA 2013 to recover the sum due and owing by the proprietors. For ease of reference, I produce here s. 78 of SMA 2013:

78. Procedure for recovery of sums due

(1) Where a sums becomes recoverable by the management corporation by virtue of subsection 52(4), 60(4), 60(5), 61(4), 61(5) or 77(3), or by a subsidiary management corporation by virtue of subsection 68(4), from a proprietor under this Act, the management corporation or the subsidiary

management corporation, as the case may be, may serve on the proprietor a written notice demanding payment of the sum due within the period as may be specified in the notice which shall not be less than two weeks from the date of service of the notice.

(2) If any sum remains unpaid by the proprietor at the end of the period specified in the notice under subsection (1), the management corporation or the subsidiary management corporation, as the case may be, **may file** a summons or claim in a court of competent jurisdiction or before the Tribunal for the recovery of the said sum **or, as an alternative to recovery under this Section, resort to recovery under s. 79**.

(emphasis added)

[55] To this the defendant contended that, and I agreed with the defendant's contention that filing of a summons in court is not a mandatory mechanism which must be exercised by the defendant in our present case.

[56] Section 78(2) of the SMA 2013 uses the word 'may' when the filing of summons is mentioned. In *Delhi And London Bank Ltd v. Melmoth AD Orchard*, 4 IA 127, the Privy Council opined that:

There is no doubt that in some cases the word must, or the word shall, may be substituted for the word may; but that can be done only for the purpose of giving effect to the intention of the Legislature; but in the absence of proof of such intention, the word may must be taken to be used in its natural, therefore in a permissive, and not in an obligatory, sense.

(emphasis added)

[57] Not surprisingly, in *Lew On v. Mohammad Muhamed Avvuu; Setiamas Sdn Bhd & Anor (Third Party)* [2022] 1 LNS 103; [2021] MLJU 2787, His Lordship Awg Armadajaya Awg Mahmud JC adopting the *ratio* of the Privy Council in *Melmoth* (*supra*) and held that the word 'may' connotes discretion:

[88] **Therefore, where the word "may" is used in law, it conveys the meaning that it is not mandatory but rather it serves as an empowering clause** on a matter which would not be allowed before this or which confers upon the party mentioned in the clause, a discretion to do or otherwise.

[89] **In essence, "may" as an adverb means that "a choice to act or not, or a promise of a possibility", as distinguished from "shall" which makes it imperative**, OR in statutes, and **sometimes in contracts, the word "may" must be read in context determine if it means an act is optional or mandatory, for it may be an imperative**.

[90] **Since "may" does not connote a mandatory requirement, failure to do act that follows the words "may" cannot be construed as fatal to the cause or illegal or null and void**.

(emphasis added)

[58] As a result, in our present case, the natural and ordinary meaning of s. 78 does not make the filing of recovery actions a mandatory. Rather, it gives discretion to the management corporations. A management corporation has the option to either commence an action against the defaulted proprietor or to resort to the mechanism stated in s. 79 of SMA 2013 or any other mechanism.

[59] I am indeed guided by the following *ratio* of our apex court in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLJ 721 where Vernon Ong FCJ articulated that:

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. First, in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute. *Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute*. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. *The statute should be construed as a whole and the words used in a Section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited'. Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment*. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each Section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself.
>
> (emphasis added)

[60] Adopting the *ratio* from *Lew On* (*supra*) and *Tebin Mostapa* (*supra*), it is clear that s. 78 of the SMA 2013 confers discretion for the defendant to decide which mechanism is the best option to recover the outstanding sums in arrears. The Regulations which were made by the Minister in exercising the power given under s. 150 of the SMA 2013 (per the long title to the Regulations) has specifically provided such mechanism in para. 6 of the Third Schedule to the Regulations. Again, I am of the view that the defendant is entitled to impose those restrictions under para. 6 of the Third Schedule of the Regulations and cl. 4.9 of the DMC, if it thinks fit to do so. It is entirely the discretion of the management corporation to decide which of them is the best option in the circumstances. In our present case, the management corporation (namely the defendant) has obviously opted to execute the mechanism stated in para. 6 of the Third Schedule of the Regulations. There is nothing wrong or irregular in the adaptation of such mechanism because s. 78 has given the management corporation the prerogative to choose any mechanisms it deems suitable.

Whether The Plaintiff Can Claim For The Loss Of Tenancy?

[61] As discussed in the previous section, this court agrees with the defendant that the plaintiff brought this to himself by failing to pay the arrears. The plaintiff had full knowledge that the restrictions would be imposed due to his own failure to pay. Thus, his loss of rental income from the tenant cannot be attributed to the defendant.

[62] In any event, the plaintiff had admitted that the defendant has the right in preventing him and the tenant from using the lifts. The defendant also plays no part in respect of the plaintiff's tenancy agreement with the tenant. Thus, it will be unjust for the court to decide in the favour of the plaintiff and to make the defendant liable for such a loss.

[NOP at page 34]

HR Do you agree, Mr Ng, that the defendant owes no responsibility to you or your tenant with respect to this tenancy agreement?

NG Yes

HR Mr Ng, do you agree that the non-collection of rentals by you from your tenant has nothing to do with the defendant?

NG I'm saying that they are responsible for the loss of my tenants.

HR Yes, that is you position, Mr Ng.

...

HR Mr Ng, did you take any action against your tenant for the non-payment of rental –

NG No

[63] It is trite law that the courts would not allow parties to benefit from their own wrongdoing or, in this case, omission. I refer to the case of *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489 where His Lordship Gopal Sri Ram JCA (as he then was) stated in his judgment at p. 581 (CLJ); p. 492 (MLJ) that:

> *Quite apart from the construction of para 1(3)(b) of the First Schedule, there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage of his own breach*. See *Alghussein Establishment v. Eton College* [1988] 1 WLR 587; *New Zealand Shipping Co Ltd v. Societe Des Ateliers Et Chantiers De France* [1919] AC 1.
>
> (emphasis added)

[64] Likewise, in *Dato' V Kanagalingam v. David Samuels & Ors* [2006] 3 CLJ 909; [2006] 6 MLJ 521, His Lordship Mohd Hishamudin J (as he then was) reiterated in his judgment at p. 915 (CLJ); p. 528 (MLJ), para. [15]:

> [15] *Thirdly, and more important, there is a common law principle established as early as 1775 that a person cannot bring an action based on his own wrong (ex turpi causa non oritur action) (see Broom's Legal Maxims (10th Ed) p 497; and Re Sigsworth [1935] Ch 89; see also Learning the law (11th Ed) by Glanville Williams, p 109*.) That the plaintiff is guilty of wrongdoings, namely abusing and manipulating the process of court so as to cause injustice to the defendants before the High Court in the *Ayer Molek* case is clear from the judgment of the Court of Appeal in the case, which is the main subject of the article, as reported in *Ayer Molek Rubber Co Bhd & Ors v. Insas Bhd & Anor* [1995] 3 CLJ 359; [1995] 2 MLJ 734 ...
>
> (emphasis added)

[65] Therefore, in answering the fifth issue, the plaintiff had failed to show to this court that the defendant must be held liable for his loss of tenancy. For the completeness of discussion, I shall now discuss briefly the other issues of the plaintiff's case.

Other Issues

Two Prayers Sought By The Plaintiff Are Academic

[66] As premised by the defendant that prayers (ii) and (v) sought by the plaintiff ought not to be granted by this court since the plaintiff is no longer the owner of the unit. The plaintiff has in his examination in chief admitted that he has sold off the unit in 2020. (See, NOP pp. 8 to 9)

[67] It is trite law that the court will not act in vain and/or make a determination on issues which are academic. (*Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113; *Husli Mok v. Superintendent Of Lands & Surveys & Anor* [2014] 9 CLJ 733; [2014] 6 MLJ 766). In their submissions, the plaintiff has not discussed any points on these two prayers. Thus, I shall disregard these two prayers.

Prayers For Interim Injunction Were Not Pursued

[68] The prayers for an interim injunction as set out in prayers (iii) and (iv) were not pursued by the plaintiff prior to the commencement of the trial although they were stated in the statement of claim. I agree with the defendant's counsel that in light that this matter has proceeded to full trial, the interlocutory and/or interim reliefs sought by the plaintiff to maintain *status quo* are no longer live issues.

Issue Concerning Invalid Notices Issued By The Defendant

[69] In their submission, the plaintiff has alleged that the notices issued by the defendant were not in compliance with reg. 31 of the Regulations and thus are void and invalid in the eyes of laws. It is my view that if at all this is an issue, the conduct of the plaintiff in sending proposal to pay the amount demanded is an estoppel by conduct (as discussed in para. [37] above). Besides, this has never been pleaded in their statement of claim or reply to defence. The law is trite that parties are bound by their own pleading: *Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit B Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185; *Saiman Umar v. Lembaga Pertubuhan Peladang* [2015] 9 CLJ 153; [2015] 6 MLJ 492. Neither has it been raised in the "issues to be tried" agreed by the parties before the commencement of the trial. It cannot be abruptly raised up at the submission stage.

Improper Service Of Notice Of Demand

[70] The plaintiff alleged that the notice of demand dated 11 September 2017 had been improperly served on the plaintiff. However, the defendant rebutted this by bringing to the attention of this court that at no point did the plaintiff dispute receiving the notice of demand dated 11 September 2017. Also, as mentioned earlier, the plaintiff has even emailed his settlement proposal in response to the notice of demand. He is estopped from disputing this now.

[71] Also, just like the issue on the validity of the notices issued, it is my finding that the plaintiff has never pleaded this in his statement of claim or his reply to defence. Again, parties must be bound by their pleadings, Similarly, this has never been listed in the "issues to be tried" agreed upon pre-trial. Hence, it is a great injustice if I allow the sudden submission on this during the submission stage.

Allegation That The Service Lift Is Unfit For Usage

[72] In his pleadings, the plaintiff has also averred that it was inappropriate for the tenant to use the service lift. He also alleged that the usage of the same would endanger the tenant. I agree with the defendant that the plaintiff has never substantiated his pleadings with any evidence of the service lift's unsuitability for resident use and/or its supposedly dangerous characteristics. The tenant's letter also did not mention about this.

[73] It is in fact trite that a pleading unsubstantiated by evidence is nothing more than a bare averment – *Ng Ben Thong & Ors v. Krishnan Arumugam* [1997] 1 LNS 85; [1998] 5 MLJ 579 where Kamalanathan Ratnam JC (as he then was) held at p. 583:

> I am asked by the defence to rely on its pleadings and to dismiss this case. The defendant must realize *that pleadings is not evidence, It is a bare averment of a party's case. The party has to adduce evidence to substantiate its pleadings. Whilst pleadings cannot become evidence in the absence of evidence being led in court, similarly evidence cannot be led outside the pleadings*. Pleadings and evidence become the heart and soul of a case. They complement each other.
>
> (emphasis added)

Hearsay Evidence

[74] As mentioned earlier, the plaintiff himself was not occupying the unit at the material time. Only the tenant stayed there. Henceforth, his allegation through his evidence about the inaccessibility to the unit, the unsafe nature of the service lift and many other statements were made without personal knowledge. These testimonies are hearsay. It is trite that hearsay evidence is generally inadmissible.

[75] Despite the crucial need for the tenant to testify to confirm and collaborate these hearsay allegations of the plaintiff, he was never called to give evidence at the trial. He was, however, listed as a witness in the witness list submitted pre-trial.

[76] The plaintiff contended that the tenant has since moved to China and it would involve unreasonable delay and expense for him to give evidence. Thus, the plaintiff sought to invoke the exceptions in allowing the admission of hearsay evidence and cited the cases of *PP v. Norfaizal Mat (No 2)* [2008] 8 CLJ 576 and *Sim Tiew Bee v. PP* [1973] 1 LNS 138 as support.

[77] I am guided by the *ratio* of the Court of Appeal in *Tee Hock Keong v. PP* [2021] 1 LNS 497; [2021] MLJU 566 to ascertain this:

> [25] In our case, apart from writing to the Immigration Department and getting their confirmation (P108) that Wulandari had been deported to her home country, the prosecution did not take any other steps to procure her attendance in court. The prosecution needs to do more if it wants to

rely on the exception to the hearsay rule in s. 32(1)(i) of the Evidence Act. The prosecution did not use its best endeavour to locate Wulandari, nor did they take reasonably practicable steps to ensure the attendance of this witness from a neighbouring country. *The law requires strict proof to explain the non-availability of the maker of a statement as a witness*. See *Mohamed Ghouse v. R* [1910] 11 SSLR 31; *Allied Bank (Malaysia) Berhad v. Yau Jiok Hua* [1998] 2 CLJ 33; [1998] 6 MLJ 1. *The circumstances that would bring a statement within any one of the exceptions in s. 32(1) of the Evidence Act must be established by the party desiring its admission as evidence*. This was reiterated by the Federal Court in *Sim Tiew Bee v. Public Prosecutor* [1973] 1 LNS 138; [1973] 2 MLJ 200. See also *Public Prosecutor v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747; [1996] 5 MLJ 405 (HC).

...

[28] Further, the commentary in *Sarkar's Law of Evidence* (14th Ed) at page 649, in respect of admissibility of statements under section 32(1) of the Evidence Act without calling the maker states as follows:

> *Where no diligent and reasonable exertion were made to procure the witness, the court could not come to a finding that the witness could not be found and therefore his statement could not be admitted under the section. Mere ignorance of the witness is not sufficient to invoke the section. As the interpretation appears to be somewhat sound, I will, for the present case, adopt their view. It stands to reason that unless stringent conditions are prescribed and fulfilled, the established rule against the reception of hearsay evidence would be eroded; courts would have to accept as evidence statements which may not stand the vigours of cross-examination had the maker been called to give evidence.*

See also the cases of *Public Prosecutor v. Lom Bong Kat & Anor* [1992] 4 CLJ 2173; *DA Duncan v. Public Prosecutor* [1980] 1 LNS 12; [1980] 2 MLJ 195; *PP v. Mogan Ayavoo* [2004] 3 CLJ 623.

[29] The combined import of these authorities is that before a statement recorded by the police in the course of investigations could be admitted under s. 32(1)(i) of the Evidence Act, the necessary pre-conditions must be satisfied. In the context of the present case, it must be shown by the prosecution that it has taken all necessary and reasonable steps to locate and procure the attendance of Wulandari in court. However, when the evidence is scrutinised it is abundantly clear that steps taken by the prosecution to locate and procure this witness are woefully inadequate and do not fulfil the stringent pre-requisites for the admissibility of her s. 112 CPC statement as an exception to the hearsay rule under s. 32(1) of the Evidence Act. *The mere residence of a witness outside of jurisdiction of the court is inadequate to qualify as an exception under section 32(1) of the Evidence Act. More must be shown as to why procuring such a witness would cause delay or expense which under the circumstance appears to the court unreasonable.*

(emphasis added)

[78] In our present case, in view that the entire trial of this case was conducted *via* remote communication technology, as in many other cases in my court, arrangement could easily be made for the tenant to testify remotely from China (or anywhere abroad) without the hassle and risk of travelling during the pandemic. Hence, the excuse that it would involve unreasonable delay and expenses to call him is unacceptable and unreasonable. With the advancement of technology and with the new O. 33A of the Rules of Court 2012 which allows and lays down the details for proceedings to be conducted through remote communication technology, mere residence of a witness outside of jurisdiction of the court is indeed inadequate to qualify as an exception under s. 32(1) of the Evidence Act 1950.

[79] I am further guided by another leading authority on point, namely, the evaluation made by Augustine Paul JC (as he then was) for the admissibility of hearsay evidence under ss. 32(1) and 73A of the Evidence Act 1950 in *Allied Bank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33; [1998] 6 MLJ 1. At p. 49 (CLJ); pp. 16 to 17 (MLJ), His Lordship opined that:

> The statement of a person who is outside the jurisdiction of the court would fall under the classification of a person whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable (see *Ng Yiu Kwok & Ors v. PP* [1989] 1 LNS 52; [1989] 3 MLJ 166). *However, it would be dangerous to (subscribe to the doctrine that mere residence out of the jurisdiction is adequate to dispense with the personal attendance of a witness and to allow his statement to be tendered in evidence* (see *Mohamed Ghouse v. R* [1910] 11 SSLR 31; *Kadappa v. Thirupathi* AIR 1925 Mad 444). *Sufficient evidence must be adduced to show that it would involve such delay and expense as would seem unreasonable to produce the maker as a witness* (see *Sim Tiew Bee v. PP* [1973] 1 LNS 138; [1973] 2 MLJ 200). *The question of the reasonableness of the amount of delay or expense should be considered with reference to the circumstances of each case. It is essentially a matter for the court to determine whether the attendance of a witness cannot be procured without any unnecessary amount of delay and expense* (see *Jati Mali v. Emperor* [1929] 31 Cr LJ 857; *Annavi Muthiriyan v. Emperor* [1915] 16 Cr LJ 294).
>
> (emphasis added)

[80] But for a bare statement during submission, the plaintiff has not forwarded any other convincing details to establish the 'difficulty' in calling the tenant as his witness. It is, thus, my finding that the reason given by the plaintiff is insufficient for the application and reliance on s. 32(1) of the Evidence Act 1950. The statements by PW1 which are not from his personal knowledge are thus inadmissible hearsay evidence.

Conclusion

[81] In our case, the plaintiffs had failed to pay the outstanding sum due and owing to the defendant even though numerous remainders have been given to him. The plaintiff has attempted to deny the receiving of the same. However, the plaintiff himself had admitted this through his proposal to settle. The plaintiff cannot then blow hot and cold in his stance. Moreover, as discussed earlier, this court also do not find that the defendant had unlawfully control or possessed the unit. It was within the defendant's rights to impose such restrictions on the plaintiff in view of his failure to pay the arrears due and owing to the defendant. Also, without the first-hand testimony from the tenant, most of the allegations made by the plaintiff have failed to be established. All these render the plaintiff's claim incapable to be sustained.

[82] To conclude, on the totality of the evidence, this court finds that the plaintiff has failed to prove to this court on the balance of probabilities that the defendant had taken control or possession of the unit unlawfully. It is also within the defendant's rights as the management corporation to impose such restriction on the plaintiff (and the tenant) because the plaintiff had failed to pay the outstanding amount. I, therefore order that this suit be dismissed with costs.